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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: WAC 01 024 53335

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 30 2003

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner claims to be a branch office of a company established as a state owned enterprise pursuant to the laws of China. The petitioner includes the designation "Inc." in its name but has provided no incorporating documents or certificates of qualification to do business in the United States. The petitioner claims to be involved in international trade specializing in the area of mechanical and electrical projects, engineering, training, and consulting for construction projects. It seeks to employ the beneficiary as its chief executive officer and president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioning organization required an executive or managerial position.

On appeal, counsel for the petitioner asserts that the Service erred in its decision and findings.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner through its counsel initially stated that the beneficiary had been designated its manager and also was to coordinate other business opportunities in the United States with other sectors of the multinational organization. Counsel stated that the beneficiary performed both managerial and executive duties and that he would direct and coordinate all activities of the petitioner and multinational activities in the United States.

The director requested additional information regarding the beneficiary's duties for the United States petitioner, including a specific day-to-day description of the beneficiary's duties and a list of all the petitioner's employees.

In response, the petitioner provide the following description of the beneficiary's duties in the United States:

Seeking project investing partners in the U.S. to develop market jointly both in China and the U.S.
Exploring and investigating the intended investing project; negotiating with all parties as sole representative of [the petitioner] and making decisions.
Obtaining first-hand information of the U.S. manufacturer and enterprises regarding the quantity, price, and reputations of their products.
Analyzing and comparing all the information from different sources and deciding purchasing policies.
Organizing, sponsoring bilateral trade activities between Chinese and American entrepreneurs to strengthen the economic cooperation.
Managing, directing, and controlling daily business activities.

The petitioner also noted that the beneficiary's day-to-day activities involved planning revenue objectives, setting the target market and marketing strategies, and exploring potential suppliers. The petitioner also indicated that the beneficiary organized human and financial resources for site visits to China, analyzed market trends, set purchase policies, negotiated with

business partners as the sole representative of the petitioner, and reviewed and signed all contracts on behalf of the petitioner. The petitioner noted further that the beneficiary supervised lower level employees and made hiring and firing determinations and reported to the parent company.

The petitioner also provided its California DE-6 Form, Quarterly Wage and Withholding Report for the pertinent quarter ending in December of 2000. The DE-6 Form revealed the petitioner employed the beneficiary and one other individual identified as the office manager for finance during this time period.

The director determined that it was unreasonable to believe that the beneficiary would not be involved in the day-to-day non-supervisory duties that were commonplace in the international trading industry. The director also determined the record reflected that the beneficiary would be a first-line supervisor with direct supervision over the petitioner's employees. The director concluded that the record did not establish that the beneficiary had been or would be employed in a primarily executive or managerial capacity, or that the petitioning organization required such a position.

On appeal, counsel for the petitioner asserts that the petitioning company's involvement in several projects requires the beneficiary's professional expertise as an engineer and the beneficiary's executive authority to negotiate and act on behalf of the foreign entity. Counsel also asserts that the beneficiary was the principal architect of the petitioner's re-structuring to accommodate a market shift from international trading and commercial construction to areas involving communications and transportation projects. Counsel further asserts that the employees supervised by the beneficiary are professional employees. Counsel finally asserts that the beneficiary with little or no guidance from the parent company develops all corporate policy, company objectives, and exercises the hiring and firing authority over all the company's professional employees.

It is noted that the petitioner asserts that the beneficiary is engaged in both managerial duties under section 101(a)(44)(A) of the Act and executive duties under section 101(a)(44)(B) of the Act. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner's description

of the beneficiary's job duties is more indicative of an individual performing the operational duties of an agent or representative of the overseas entity. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Managers and executives plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. The petitioner had only one other employee at the time of filing the petition and has elected not to provide a detailed description of the second employee's duties. The addition of a third employee does not contribute to a finding of the beneficiary's eligibility under this visa classification. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, counsel's assertion that the petitioner's second employee is a professional employee is without merit. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980).

Counsel's assertions regarding the beneficiary's expertise as an engineer also do not contribute to a conclusion that the beneficiary will be primarily performing executive or managerial duties. Expertise in engineering does not necessarily translate to expertise in or performance of managerial or executive functions. Counsel's assertion that the beneficiary has executive authority to negotiate and act on behalf of the foreign entity is authority given to any agent or representative of an organization and does not connote executive capacity as defined under the Act.

Counsel's assertion that the beneficiary develops all corporate policy, company objectives, and exercises the hiring and firing authority over all the company's employees is noted. However, the more detailed description of the beneficiary's duties indicates that not only is the beneficiary developing policies, he is also implementing those policies. The Service is unable to determine that the beneficiary will be primarily performing managerial or executive duties with respect to the described activities rather than actually performing the activities.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties indicate that a majority of his duties relate to the performance of basic operational tasks necessary for the petitioner to continue its business. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or

supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary at the time of filing the petition had been or would be employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that it has been doing business as defined by the regulation.

8 C.F.R. 204.5(j)(2) defines the phrase "doing business" as follows:

Doing business means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office.

Based on the record, the petitioner is a branch office of the overseas entity and the beneficiary is seeking investing partners and investigating potential investments. The record does not establish that the petitioner is more than an office of the overseas entity with the beneficiary acting as its agent.

For this additional reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.